A

TARMIZI YACOB & ANOR

v.

PP & ANOTHER APPEAL

B

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ (MALAYA)
RICHARD MALANJUM CJ (SABAH & SARAWAK)
JAMES FOONG FCJ
[CRIMINAL APPEALS NOS: 05-37-2004 (W) &
C 05-38-2004 (W)]
27 JULY 2010

CRIMINAL LAW: *Dangerous drugs - Trafficking in cannabis - Act preparatory to trafficking of dangerous drugs - Negotiation for sale of*
D *drugs - Supply and delivery of drugs in exchange for payment - Whether appellants guilty as charged - Whether only guilty of possession - Common intention - Whether proved - Dangerous Drugs Act 1952, ss. 39B(1)(a), 39B(1)(c), 39B(2) - Penal Code, s. 34*

E ***CRIMINAL PROCEDURE:*** *Charge - Amendment - Absence of consent of Public Prosecutor on amended charge - Whether trial of appellants a nullity - Prosecution conducted by Deputy Public Prosecutor - Whether consent superfluous*

F ***CRIMINAL PROCEDURE:*** *Witness - Informer - Failure to call informer as witness - Informer merely introduced second appellant to PW10 - Whether not an agent provocateur - Whether inconsequential*

The appellants in these two appeals (appellant 1 and appellant 2 respectively) were originally charged with an offence under s.
G 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read with s. 34 of the Penal Code. At the end of the trial, both were however convicted and sentenced to death on the amended charge under s. 39B(1)(c) of the Act read with s. 34 of the Penal Code. The facts were that, on 4 April 1996, at around 5pm, one Chief
H Inspector Amir Hamzah ('PW10'), acting as a drug buyer, was introduced by his source, Mud, to appellant 2 at a restaurant in Sungai Buluh. PW10 then began discussions with appellant 2 to buy 10 kilos of ganja/cannabis which appellant 2 agreed to supply. Appellant 2 invited PW10 to come with him to Kampung Baru,
I Kuala Lumpur to collect the cannabis, but, as the drugs were still unavailable, asked PW10 to come to the same location the next day. On 5 April 1996, at about 9.20pm, appellant 2 arrived at the

designated location with another person introduced to PW10 as Tarmizi, appellant 1. The appellants then said that they only had with them 3 kilos of cannabis, and simultaneously with that, opened up a bag containing the proscribed drugs and showed them to PW10. Soon thereafter, upon getting the preset signal, the police raiding party scrambled to action and apprehended the appellants after a struggle. The High Court judge found both appellants guilty of the amended charge and consequently convicted and sentenced them as aforesaid. The appellants appealed to the Court of Appeal but the appeals were dismissed. They appealed further to the Federal Court arguing, *inter alia*, that the amended charge was flawed as the Public Prosecutor's sanction for the amendment had not been obtained by the prosecution.

Held (dismissing appeals and affirming respective convictions and sentences)
Per Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the court:

(1) This court agreed that consent to the amended charge preferred against the appellants at the close of the case for the prosecution would be superfluous here as the prosecution was conducted by a Deputy Public Prosecutor. *Public Prosecutor v. Lee Chwee Kiok* (not foll); *Garmaz s/o Pakhar & Anor v. Public Prosecutor* (foll); *PP v. Oie Hee Koi* (refd); *Gnanasegaran a/l Pararajasingam v. Public Prosecutor* (foll). (paras 35-39)

(2) There was no necessity for the evidence of Mud in the narrative of the prosecution's case. The only role of Mud was to introduce PW10 to appellant 2. Just because Mud was known to appellant 2 did not make him an agent provocateur. This court agreed with the view of the Court of Appeal that the role of Mud could not be compared to that of the informer in *Ti Chwee Hiang v. Public Prosecutor*. Accordingly, there was no merit in this issue. *Ti Chwee Hiang v. Public Prosecutor* (dist); *PP v. Mansor Md Rashid & Anor* (foll). (para 43)

(3) The trafficking here was the sale of cannabis or the purchase of it by PW10. What transpired on 5 April 1996 along Jalan Raja Alang, Kampung Baru was the final chapter in the preparation of the trafficking of the drugs which constituted the supply and delivery of 3 kilos of the cannabis by appellant 1 for the purpose of appellant 1 and appellant 2 jointly handing it over

A to PW10 in exchange for the payment as earlier agreed. The appellants were charged with common intention to ensure the sale of the cannabis to PW10. And such sale was proved by direct evidence without relying on any of the statutory presumptions in the Act. On the issue of delivery, the
B transaction was in fact completed since the appellants had produced the cannabis to PW10 and were only waiting for the payment when the police moved in to apprehend them. *Wan Mazuki bin Wan Abdullah v. Public Prosecutor* Rayuan Jenayah No. 05-56-2008 (T) (refd); *Public Prosecutor v. Sa'ari Jusoh*
C (dist). (paras 48-50)

(4) There was no misdirection shown or apparent in the evaluation of the evidence adduced and the standard of proof applied by the High Court judge before coming to his decision. While in
D essence the basic defence of the appellants was one of mere denial, there was overwhelming evidence adduced indicating the roles played by appellant 1 and appellant 2 in order to make the cannabis available for PW10 to purchase. The very act of each of them in attempting to flee from the scene and avoiding
E arrest by the police was one clear indication that both knew what they were dealing in with PW10. Accordingly the respective appeals of appellant 1 and appellant 2 were dismissed. *Lee Lee Chong* (refd). (paras 51-52)

F ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu-perayu dalam kedua-dua rayuan di sini (perayu 1 dan perayu 2 masing-masingnya) pada asalnya dituduh dengan kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') dibaca bersama s. 34 Kanun Keseksaan. Namun begitu, di akhir
G perbicaraan, kedua-dua perayu telah disabitkan dan dihukum mati di atas kesalahan terpinda di bawah s. 39B(1)(c) dibaca bersama s. 34 Kanun Keseksaan. Faktanya adalah bahawa, pada 4 April 1996, jam lebih kurang 5 petang, seorang Cif Inspektor Amir Hamzah ('SP10'), dengan menyamar sebagai pembeli dadah, telah
H diperkenalkan oleh sumbernya, Mud, kepada perayu 2 di sebuah restoran di Sungai Buluh. Berikutnya, SP10 memulakan perbincangan dengan perayu 2 untuk membeli 10 kilogram ganja di mana perayu 2 bersetuju untuk membekalkannya. Perayu 2 kemudian menjemput SP10 mengikutinya ke Kampung Baru, Kuala Lumpur
I untuk mengambil dadah tersebut, tetapi, oleh kerana dadah belum

tersedia, meminta supaya SP10 datang ke tempat yang sama keesokan harinya. Pada 5 April 1996, jam lebih kurang 9.20 malam, perayu 2 sampai di tempat yang dijanjikan bersama seorang lain yang diperkenalkan kepada SP10 sebagai Tarmizi, iaitu perayu 1. Perayu-perayu kemudian mengatakan mereka hanya mempunyai 3 kilogram ganja sahaja dan sekaligus menunjuk dan membuka sebuah beg di hadapan SP10 yang mengandungi dadah tersebut. Sejurus kemudian, setelah mendapat isyarat dari SP10, pasukan serang hendap polis telah menyerbu dan menangkap perayu-perayu selepas satu pergelutan. Hakim Mahkamah Tinggi mendapati kedua-dua perayu bersalah atas pertuduhan pindaan, dan telah mensabitkan perayu-perayu dan menjatuhkan hukuman seperti di atas. Perayu-perayu merayu ke Mahkamah Rayuan tetapi gagal. Mereka merayu seterusnya ke Mahkamah Persekutuan sambil berhujah, antara lain, bahawa pertuduhan pindaan adalah cacat oleh kerana izin Pendakwa Raya baginya telah tidak dipohon oleh pendakwaan.

Diputuskan (menolak rayuan-rayuan dan mengesahkan sabitan dan hukuman)
Oleh Richard Malanjum HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

(1) Mahkamah ini bersetuju bahawa izin Pendakwa Raya bagi pertuduhan pindaan yang dihadapkan kepada perayu-perayu di akhir kes pendakwaan sudah menjadi tidak perlu memandangkan pendakwaan itu sendiri telah dikendalikan oleh seorang Timbalan Pendakwa Raya. *Public Prosecutor v. Lee Chwee Kiok* (tidak diikuti); *Garmaz s/o Pakhar & Anor v. Public Prosecutor* (diikuti); *PP v. Oie Hee Koi* (dirujuk); *Gnanasegaran a/l Pararajasingam v. Public Prosecutor* (diikuti).

(2) Tiada keperluan bagi keterangan Mud di dalam naratif kes pendakwaan. Satu-satunya peranan Mud adalah untuk memperkenalkan SP10 kepada perayu 2. Cuma kerana Mud dikenali oleh perayu 2 tidak menjadikannya seorang agen provokatur. Mahkamah ini bersetuju dengan pandangan Mahkamah Rayuan bahawa peranan Mud tidak boleh dibanding dengan peranan informer di dalam *Ti Chwee Hiang v. Public Prosecutor*. Oleh itu tiada merit dalam isu ini. *Ti Chwee Hiang v. Public Prosecutor* (dibezakan); *Pendakwa Raya v. Mansor Mohd Rashid & Anor* (diikuti).

(3) Pengedaran di sini adalah menjual ganja dan pembeliannya oleh SP10. Apa yang berlaku pada 5 April 1996 di Jalan Raja Alang, Kampung Baru adalah bab terakhir dalam penyediaan kepada pengedaran dadah yang terdiri dari perbuatan membekal dan menghantar 3 kilogram ganja oleh perayu 1 bagi membolehkan perayu 1 dan perayu 2 secara bersama menyerahkannya kepada SP10 dengan balasan pembayaran sepertimana yang dipersetujui sebelumnya. Perayu-perayu dituduh dengan niat bersama memastikan penjualan dadah kepada SP10. Dan penjualan telah dibuktikan melalui keterangan terus tanpa bergantung kepada mana-mana anggapan statutori di dalam Akta. Berhubung isu penyerahan, transaksi itu sebenarnya telah disempurnakan apabila perayu-perayu menyerahkan ganja kepada SP10 di mana mereka hanya menunggu pembayaran sahaja bilamana polis menyerbu dan menahan mereka. *Wan Mazuki bin Wan Abdullah v. Public Prosecutor* (dirujuk); *Public Prosecutor v. Sa'ari Jusoh* (dibezakan).

(4) Tiada salah arahan berlaku atau kelihatan telah dilakukan oleh hakim Mahkamah Tinggi dalam penilaian keterangan yang dikemukakan dan dalam memakai standard pembuktian sebelum mencapai keputusannya. Sementara pembelaan asas perayu-perayu adalah penafian semata-mata, terdapat keterangan kukuh yang dikemukakan yang menunjukkan peranan-peranan yang dimainkan oleh perayu-perayu dalam memastikan dadah ada tersedia untuk dibeli oleh SP10. Malah, perbuatan setiap perayu dalam cuba melarikan diri dari tempat kejadian dan mengelak tangkapan adalah penunjuk jelas bahawa kedua-duanya tahu mengenai urusan mereka dengan SP10. Oleh itu, kedua-dua rayuan perayu 1 dan perayu 2 adalah ditolak. *Lee Lee Chong* (dirujuk).

Case(s) referred to:

Garmaz Pakhar & Anor v. PP [1995] 3 SLR 701 ***(foll)***
Gnanasegaran Pararajasingam v. PP [1997] 4 CLJ 6 CA ***(foll)***
Lee Lee Chong v. PP [1998] 4 CLJ 655 CA ***(refd)***
PP v. Lee Chwee Kiok [1977] 1 LNS 96 HC ***(not foll)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(foll)***
PP v. Mohamed Halipah Adan [1981] CLJ 92; [1981] CLJ (Rep) 238 HC ***(refd)***
PP v. Oie Hee Koi [1967] 1 LNS 132 PC ***(refd)***
PP v. Sa'ari Jusoh [2007] 2 CLJ 197 FC ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(dist)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 39A(1)(c), 39B(1)(a), (c), (2), 40A
Penal Code, s. 34

For the appellants - Gubachan Singh (Ratnam with him); M/s Bachan & Kartar
For the prosecution - Ahmad Bache DPP
Watching brief for the Indonesian Consulate - Jaya Prakash

[Appeals from Court of Appeal, Criminal Appeal No: W-05-53-1997 & W-05-54-1997]

[Editor's note: For the Court of Appeal judgment, please see Tarmizi Yaacob & Satu Lagi lwn. PP [2006] 4 CLJ 472.]

Reported by Susheila Sreedharan/Wan Sharif Wan Ahmad

JUDGMENT

Richard Malanjum CJ (Sabah & Sarawak):

Introduction

[1] There are two appeals before us heard together. In both the appeals the respective appellants were convicted and sentenced to death on the amended charge under s. 39B(1)(c) of the Dangerous Drugs Act 1952 (the Act) read with s. 34 of the Penal Code and punishable under 39B(2) of the Act by the High Court Kuala Lumpur on 5 August 1997. Their respective appeals to the Court of Appeal were dismissed on 2 December 2004. They now appeal to this court on 15 grounds of appeal.

[2] Initially both the appellants were charged under s. 39B(1)(a) of the Act read with s. 34 of the same Code and punishable under 39B(2) of the Act. However, at the end of the case for the Prosecution the learned Deputy Public Prosecutor amended the charge to one of s. 39B(1)(c) of the Act.

[3] In this judgment the appellant in the first appeal is described as appellant 1 and the appellant in the second appeal as appellant 2 and together as the appellants.

Factual Backgrounds

[4] The amended charge preferred against appellants in the High Court reads:

A Bahawa kamu bersama-sama pada 5 April 1996, lebih kurang 9.45 malam, di Jalan Raja Alang, Kampung Baru, Kuala Lumpur, Wilayah Persekutuan, dalam mencapai niat bersama, kamu telah di pihak kamu melakukan satu perbuatan persediaan untuk mengedar dadah berbahaya, iaitu 2996.4 gram cannabis, suatu kesalahan di
B bawah seksyen 39B(l)(c) Akta Dadah Berbahaya 1952 (Disemak 1980) dibaca bersama dengan seksyen 34 Kanun Keseksaan dan boleh dihukum di bawah seksyen 39B (2) Akta Dadah Berbahaya 1952.

[5] It is the case for the prosecution that on 4 April 1996 at
C around 5pm Chief Inspector Amir Hamzah bin Hanudin (PW10) from the Unit Risikan Jenayah Ibu Pejabat Bukit Aman, acting as a drug buyer, was introduced by his source a person known as Mud to Agam, the appellant 2, an Indonesian, at the Restoran Hashimah Paya Jaras, Sungai Buluh.

D **[6]** After Mud had introduced PW10 to appellant 2 he asked Mud to leave. PW10 then began discussion with appellant 2. PW10 informed appellant 2 that he wished to buy 10 kilo of drugs 'ganja' ('cannabis'). Appellant 2 agreed to supply at the price of RM1,700
E per kilo. PW10 did not agree on the price. Further negotiation took place on the price and it was finally agreed at RM1,600 per kilo. Appellant 2 then told PW10 that the cannabis was at Kampung Baru, Kuala Lumpur in the area of Jalan Raja Alang and could only be collected in the evening or at night.

F **[7]** At about 7pm on the same evening appellant 2 invited PW10 to come with him to Kampung Baru to collect the cannabis. PW10 drove his car, a red GTO Mitsubishi with registration number WDX 983. Appellant 2 sat on the passenger seat.

G **[8]** On arrival at the place appellant 2 went out for 15-20 minutes but only to come back to say that the cannabis was not yet available. Appellant 2 then told PW10 they were to return to Paya Jaras and on the way back appellant 2 informed PW10 that the cannabis could not be obtained that evening as it was not safe
H to do so. Appellant 2 then said to PW10 that he could get someone to deliver the cannabis at Paya Jaras with an additional payment of RM300. PW10 disagreed and advised appellant 2 that if there was any further development he was to call him on his mobile phone. In reply appellant 2 asked PW10 to come to Kampung Baru
I at the same location around 3pm the next day.

[9] At around 11.30am the next day PW10 went to the Operation Room of the Narcotics Department Task Force of the Bukit Aman Police Headquarters at Cheras to brief the members of the Task Force ('the police') on the pending transaction at Jalan Raja Alang Kampung Baru in which he would pose as a buyer of the cannabis.

[10] It was therefore agreed during the briefing:

i. that the police would focus on the agreed location;

ii. that PW10 would used the same car; and

iii. that the police would move to ambush only after PW10 had given the signal by opening the boot of his car.

[11] At around 7.50pm on 5 April 1996 appellant 2 called PW10 on his mobile phone. The first four calls of the same number PW10 did not answer. It was only the fifth call that he answered and it was appellant 2.

[12] Over the phone appellant 2 told PW10 that the cannabis was available and that PW10 was to come to Jalan Raja Alang in front of YULI clinic at around 9pm PW10 agreed.

[13] PW10 then informed the police who were with him at the Golf Club PDRM of the agreed location and emphasized to them that the seller would be entering his car.

[14] PW10 arrived at the designated location at about 9.10pm and knew that the police had also arrived due to the presence of one member in short pants near the public telephone booth. PW10 parked his car under a street light in order to have clear sight of what might happen.

[15] At about 9.20pm appellant 2 arrived with another person introduced to PW10 as Tarmizi, the appellant 1. PW10 asked both of them to enter his car. Appellant 1 was seated on the front passenger seat while appellant 2 was at the back seat. Appellant 1 proceeded to inform PW10 that he only had 3 kilo of the cannabis. PW10 agreed to buy and appellant 1 asked for payment.

[16] When appellant 1 asked for the money PW10 showed him and said that he would only pay upon seeing the cannabis. Appellant 1 therefore went out of the car walking to the rear of the car towards a corner not far from it. PW10 then asked appellant 2 to come to the front seat.

[17] While waiting for appellant 1 PW10 was informed by appellant 2 that only 3 kilo could be obtained for the transaction but he would arrange again next time.

[18] After about 15-20 minutes appellant 1 came back. PW10 asked appellant 2 to come out with him and moved to the rear of the car. The three met at the rear of the car. Appellant 1 told PW10 he had the cannabis inside the bag he was carrying. Appellant 1 brought it in front of PW10 and appellant 2. From inside the bag appellant 1 proceeded to take out a compact bundle wrapped with transparent plastics. PW10 smelt it, looked at it and pressed it before suspecting it was cannabis.

[19] Appellant 1 and appellant 2 asked PW10 to be quick. PW10 went to get the money inside the car but at the same time pulling the lever to open the boot to signal the police to act. At that time the cannabis was still with appellant 1. When PW10 was about to return to the rear of the car he saw the police heading for appellant 1 and appellant 2. PW10 went back into his car, turned on the engine and sped off.

[20] The transaction between PW10 and the appellants were witnessed by Chief Inspector Fisol (PW5) who led the police that night and Det. Cpl Rosdi (PW8). They were about 10-15 meters away from the car of PW10. They identified appellant 1 as a tall, well-built man wearing a red short-sleeve T-shirt and dark jeans while appellant 2 was wearing a white T-shirt and dark pants.

[21] When the signal to act came on PW5 and PW8 ran to apprehend appellant 1 and appellant 2 respectively. However after a struggle with PW5 appellant 1 managed to free himself and threw away the bag he was carrying before running away. PW5 did not pursue him but stayed back to watch over the bag thrown by appellant 1. It was Inspector Zambri who made another attempt to apprehend appellant 1. He too failed. He was injured when he was pushed and fell down. Appellant 1 was then pursued by Det. Cpl Khalid (PW7) who managed to arrest him after firing two shots at him and injuring his right leg. Several members of the police also came to assist PW7. Appellant 2 also tried to escape but was caught by PW8 with the help of Det. Sjn. Abdullah.

[22] Appellant 1 and appellant 2 were both identified by PW7 and PW8 as the two persons with PW10 that night based on their clothing.

[23] After the arrest of appellant 1 and appellant 2 PW5 examined the content of the bag in their presence. PW5 found three compressed slabs suspected to be cannabis. PW6, the Chemist, (Cheong Meow Kioon) did the analysis of the three slabs seized by the police. In his evidence PW6 said that he was given three compressed slabs of plant material wrapped with plastic sheet and secured with adhesive tape. He found the nett weight of each slab to be 1018.4 grammes, 991.4 grammes and 986.6 grammes respectively and giving the total weight of 2996.4 grammes. And after he had carried out the essential analysis on the three slabs by way of several established and accepted tests he found all the plant material of the three slabs to be cannabis as defined in s. 2 of the Act.

[24] At the end of the case for the prosecution and after giving the maximum evaluation of the evidence adduced by the prosecution the learned High Court Judge called for the defence of both appellant 1 and appellant 2. In doing so he made several findings of fact related to the issues raised by learned counsel for appellant 1 and appellant 2, *inter alia*:

a) that appellant 1 and appellant 2 were identified by PW10 and corroborated by PW5, PW7 and PW8. In addition both appellant 1 and appellant 2 were arrested at the scene of the event;

b) that the identification of appellant 1 and appellant 2 was possible that night since the views of the prosecution's witnesses who observed the event were not hampered. There were street lights and building lights in the vicinity;

c) that PW6 concluded that the three slabs he analyzed were cannabis as defined in s. 2 of the Act;

d) that appellant 1 and appellant 2 had the common intention since they acted together in the preparation for the sale of the cannabis; and

A e) that appellant 1 and appellant 2 had knowledge of the cannabis. The acts of appellant 1 in struggling with the police to resist arrest, throwing the bag containing the cannabis and running away indicated such knowledge. And so was appellant 2 who also struggled with the police in an attempt to escape.

B

[25] The learned trial High Court Judge did not think that the failure by the prosecution to tender as evidence the Police Report Dang Wangi No. 7049/96 had jeopardized the prosecution's case as he opined it was not a First Information Report. And neither did C the learned trial High Court Judge find any break in the chain of evidence adduced by the prosecution. The evidence of PW10 was also held to be admissible under s. 40A of the Act.

[26] In his unsworn statement appellant 1 said that he happened to be at the scene of the event when he heard shouts of 'Polis, D Polis, Polis'. As he was an illegal immigrant and feared of being apprehended he ran off. In the process he dropped his watch and while looking for it he heard a gun shot and felt pain on his right thigh. He fainted.

E **[27]** The learned trial High Court Judge did not find the version of appellant 1 as having cast any reasonable doubt in the prosecution's case. His reasons were as follows:

a) that appellant 1 did not deny that he was at the scene of the F event that night;

b) that there was no reason why the police would go for appellant 1 if indeed there were other people in the vicinity at that time. Further it was illogical for appellant 1 to say that he ran away as he was an illegal immigrant yet gave his watch a priority G when he stopped to look for it at the risk of being arrested; and

c) that there was nothing in the statement of appellant 1 to contradict the evidence of the prosecution that at that time he was carrying a bag containing the cannabis and which he threw H away when the police wanted to arrest him.

[28] Appellant 2 also made an unsworn statement from the dock. He said that on 4 April 1996 he did meet Mud with another person introduced to him as Abang Jo at the restaurant in Paya Jaras. I While at the restaurant Mud and Abang Jo agreed to meet at Jalan

Raja Alang the next day. Appellant 2 went on to say that he met Mud on 5 April 1996 at Jalan Raja Alang. Mud told him that there was a man in a car who asked him to go in. Appellant 2 said that he followed but did not enter the car. Then suddenly he heard gun shots and the shouts of 'Polis, Polis'. He was subsequently arrested.

[29] Having heard the version of appellant 2 the learned trial High Court Judge did not find it having cast any reasonable doubt on the prosecution's case for the following reasons:

a) Appellant 2 did not deny that he was at the scene of the event that night;

b) Appellant 2 did not say who was the man inside the car;

c) Appellant 2 did not deny that he struggled with the police; and

d) there was no reason or even suggested reason why the Police would arrest appellant 2.

[30] The learned trial High Court Judge thus found both appellant 1 and appellant 2 guilty of the charge preferred against them. He convicted and sentenced them accordingly.

[31] The Court of Appeal dismissed the respective appeals of the appellants. Briefly, the Court of Appeal held:

i) that preparatory act for the purpose of trafficking drugs consists of several continuing acts;

ii) that the evidence of the Chemist (PW6) was credible. There was no necessity for him to show in detail what he did in his laboratory; and

iii) that the consent of the Public Prosecutor was implied in this case since the prosecution was conducted by a Deputy Public Prosecutor.

[32] Before us learned counsel for the appellants only pursued grounds of appeal 13, 14 and 15. But he raised the issue of absence of consent of the Public Prosecutor for the amended charge.

A **Issue Of Consent On The Amended Charge**

[33] Learned counsel for the appellants submitted that the trial of his clients was a nullity in view of the absence of consent to the amended charge preferred against them at the close of the case for
B the prosecution. He cited the case of *Public Prosecutor v. Lee Chwee Kiok* [1977] 1 LNS 96. In that case the original charge was under s. 39B(1)(a) of the Act but on the day of trial the learned Deputy Public Prosecutor amended it to s. 39A(1)(c) of the same Act. Harun J (as he then was) said:

C

> It will be observed that although the original and amended charges are two distinct offences, they are both created by the same section of the law *viz.* section 39B(1) and both carry the same penalty. Both require the consent of the Public Prosecutor under section 39B(3). The learned Deputy Public Prosecutor argued that the
> D amendment was technical and as the Public Prosecutor had given his consent on the original charge he was at liberty to amend the charges in the manner he did. I do not think so. It was held in *Abdul Hamid v. Public Prosecutor* [1956] MLJ 231 that a consent to prosecute "is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side".
> E The Public Prosecutor has clearly exercised his mind in respect of the original charge when he gave his consent to prosecute some four months after the alleged offence. It was incumbent on him however to exercise the same degree of deliberation in respect of the amended charge. He has not done so ... The facts of the case were
> F fully before the Public Prosecutor at the time of giving his consent and he could have elected to proceed on the amended charge then. He did not do so. It would appear therefore that the Public Prosecutor has not given his consent to prosecute under the amended charge. That being so, the trial is a nullity on the authority of *Lyn Hong Yap v. Public Prosecutor* [1956] MLJ 226.

G

[34] In his response the learned deputy submitted to us that consent would be superfluous in this case as the prosecution was conducted by a Deputy Public Prosecutor. In its judgment the Court of Appeal held the same view.

H

[35] We agree with the view of the Court of Appeal and the submission of the learned deputy. The law was concisely and correctly summarized by Yong Pung How CJ (Singapore) in *Garmaz s/o Pakhar & Anor v. Public Prosecutor* [1995] 3 SLR 701 when he
I said this at p. 720:

> The settled Malaysian position has been to consider a deputy public prosecutor as being capable of exercising all the rights and powers of the public prosecutor ... It follows from this proposition that where prosecution is conducted by a DPP, the consent of the public prosecutor is implicit in his actions and no further written consent of the public prosecutor is required. Indeed, this was the holding of the Privy Council in *PP v. Oie Hee Koi* [1968] 1 MLJ 148. The ruling in *PP v. Oie Hee Koi* [1968] 1 MLJ 148 was followed in *Perumal v. PP* [1970] 2 MLJ 265, *PP v. Mohamed Halipah Adan* [1982] CLJ 92; [1982] CLJ (Rep) 238, *PP v. Datuk Haji Dzulkifli* [1982] 1 MLJ 340 and *PP v. Lim Boon Hock* [1985] 2 MLJ 219.

[36] The learned Chief Justice also noted that in *Public Prosecutor v. Lee Chwee Kiok (supra)* Harun J (as he then was) had not been referred to the Privy Council decision in *Public Prosecutor v. Oie Hee Koi (supra)*.

[37] And in fact Yusof Abdul Rashid J in *Public Prosecutor v. Mohamed Halipah Adan (supra)* declined to follow the judgment of Harun J. He preferred to follow *Public Prosecutor v. Oie Hee Koi (supra)* and said this at p. 245:

> It is to be noted that in the above case the prosecution was conducted before the High Court by a Deputy Public Prosecutor who under the Criminal Procedure Code is vested with all the powers of the Public Prosecutor. On the authority of this case, it is clear that where the prosecution is conducted by a Deputy Public Prosecutor the consent of the Public Prosecutor is implicit in his action and no written consent of the Public Prosecutor is required.

[38] In another case of *Gnanasegaran Pararajasingam v. Public Prosecutor* [1997] 4 CLJ 6 Mahadev Shankar JCA said this at p. 21:

> If a deputy public prosecutor is present and goes on record when the accused is called upon to plead to an offence under this Act, no separate consent should be required (see *Lyn Hong Yap v. PP* [1956] MLJ 226 and *Perumal v. PP* [1970] 2 MLJ 265).

[39] As such we find no merit in the contention of learned counsel for the appellants on the issue of absence of consent of the Public Prosecutor in respect of the amended charge.

A **Ground 13 – The Failure To Call As A Witness The Informer Mud**

[40] Next, learned counsel for the appellants argued that the learned Judges of the Court of Appeal 'erred and misdirected themselves in law and in fact in not holding that the Informer (Mud) ought to have been called by the prosecution to unfold the narrative of the prosecution's case and/or offered him to the defence'. Learned counsel contended that PW10 was introduced by Mud to appellant 2 and thus Mud must have been known to appellant 2. He cited the case of *Ti Chuee Hiang v. Public Prosecutor* [1995] 3 CLJ 1 to support his contention.

[41] Learned deputy replied that Mud was only an Informer hence his identity was protected by s. 40 of the Act. He pointed out that Mud merely introduced appellant 2 to PW10 and did nothing else. As such he was an Informer and not an agent provocateur. The learned deputy went on to say that Mud did less than the informer in *Public Prosecutor v. Mansor Md. Rashid & Anor* [1997] 1 CLJ 233 yet the Federal Court in that case ruled that the informer was not an agent provocateur when it said this at p. 253:

> In *Munusamy v. PP* [1987] 1 MLJ 492 (SC), Mohd Azmi SCJ (now FCJ) in delivering the judgment of the court, opined (at p. 494) that 'whether a person is an informer or has become an active agent provocateur would depend on the facts of each particular case'. In our instant case under appeal though Cholar introduced PW9 to the second respondent and was present when both transactions involving cannabis were struck, there was no evidence that he had done anything apart from being present. It appears obvious that his presence during the negotiation process and the transactions was merely to lend credence to PW9's intention to purchase the cannabis in the minds of the respondents.
>
> …
>
> On the particular facts and circumstances of the instant case under appeal, we are of the view that Cholar was not an agent provocateur. But even if he was, there is more than sufficient credible evidence of the respondents' involvement in the negotiation and agreement to sell to PW9 the 902g of cannabis subsequently brought out by the second respondent from room 'K' in the said house.

[42] In its judgment the Court of Appeal held that the role of Mud in this case was merely to introduce appellant 2 to PW10 unlike the informer in *Ti Chuee Hiang v. Public Prosecutor (supra)* who played an active role as an agent provocateur to arrange for the accused to meet the police and subsequently for his arrest.

[43] We have perused the whole evidence adduced. We are of the view that there was no necessity for the evidence of Mud in the narrative of the prosecution's case. In fact it was not disputed that the only role of Mud was to introduce PW10 to appellant 2. Just because Mud was known to appellant 2 did not make him an agent provocateur. We therefore agree with the view of the Court of Appeal that the role of Mud could not be compared to that of the informer in *Ti Chuee Hiang v. Public Prosecutor (supra)* 'who had enticed the appellant to walk into a deliberate trap, which had been planned and organized by PPP Noorhashim and executed by a team of six police officers led by K/Inspector Mohd Amin bin Abd Raof (PW3) who was then attached to Cawangan Anti Dadah, Bukit Aman, Kuala Lumpur, on the date and at the time and place referred to in the charge.'

[44] Accordingly, we also find no merit in this issue as raised by learned counsel for the appellants.

Grounds 14 And 15 – Custody, Control And Possession Of The Cannabis

[45] Learned counsel for the appellants contended that appellant 2 only did the negotiation with PW10 and he was not in possession of the cannabis. As such there was no question of him involved in the trafficking of the cannabis.

[46] In respect of appellant 1 learned counsel argued that he did not participate in the negotiation or in the preparatory act. He only had the custody and control of the cannabis. As such the presumption of possession applied and thus he should only be guilty of possession and not for trafficking. The case of *Public Prosecutor v. Sa'ari Jusoh* [2007] 2 CLJ 197 was cited in support.

[47] In response learned deputy submitted that the appellants were charged with common intention for the offence. And that the evidence adduced must be considered as a whole including the overwhelming evidence that the appellants acted together to effect the sale of the cannabis to PW10.

[48] On this issue the Court of Appeal held that the preparatory act for the purpose of trafficking drugs covers a number of continuing acts. It begins from an agreement until the successful handing over of the drugs to another party. The acts in between carried out to achieve the purpose included such acts as getting the supply, wrapping, sending and meeting between the parties. In this case the trafficking was the sale of cannabis or the purchase of it by PW10. And what transpired on the night of 5 April 1996 along Jalan Raja Alang was the final chapter in the preparation of the trafficking of the drugs which constituted the supply and delivery of 3 kilo of the cannabis by appellant 1 for the purpose of appellant 1 and appellant 2 jointly handing it over to PW10 in exchange for the payment as earlier agreed.

[49] The appellants were charged with common intention to ensure the sale of the cannabis to PW10. And such sale was proved by direct evidence without relying on any of the statutory presumptions in the Act. We are therefore in entire agreement with the view of the Court of Appeal in finding that the contention of the learned counsel for the appellants has no merit.

[50] On the issue of delivery it is now a settled law that to constitute actual delivery it is not necessary that the agreed price must be paid upon or before the physical delivery of the drugs. (See: *Wan Mazuki bin Wan Abdullah v. Public Prosecutor* (Rayuan Jenayah No. 05-56-2008 (T)). As such the decision in *Public Prosecutor v. Sa'ari Jusoh (supra)* should not be narrowly construed. And in this case the transaction was in fact completed since the appellants had produced the cannabis to PW10 and were only waiting for the payment when the police moved in to apprehend them.

[51] In respect of the complaint that there was misdirection in the evaluation of the evidence adduced and the standard of proof applied by the learned trial High Court Judge before coming to his decision, we agree with the Court of Appeal that there was no such misdirection shown or apparent.

[52] While in essence the basic defence of the appellants was one of mere denial, there were overwhelming evidence adduced indicating the roles played by appellant 1 and appellant 2 in order to make the cannabis available for PW10 to purchase. Indeed the very act of

each of them in attempting to flee from the scene and avoiding arrest by the police was one clear indication that both knew what they were dealing in with PW10. (See: *Lee Lee Chong v. PP* [1998] 4 CLJ 655).

[53] As learned counsel for the appellants did not pursue the other grounds of appeal we need not have to deal with them. At any rate we are not persuaded that any of them could have made the difference to our conclusion.

[54] The respective appeals of appellant 1 and appellant 2 are therefore dismissed. We affirmed their respective convictions and sentences imposed by the High Court and upheld by the Court of Appeal.